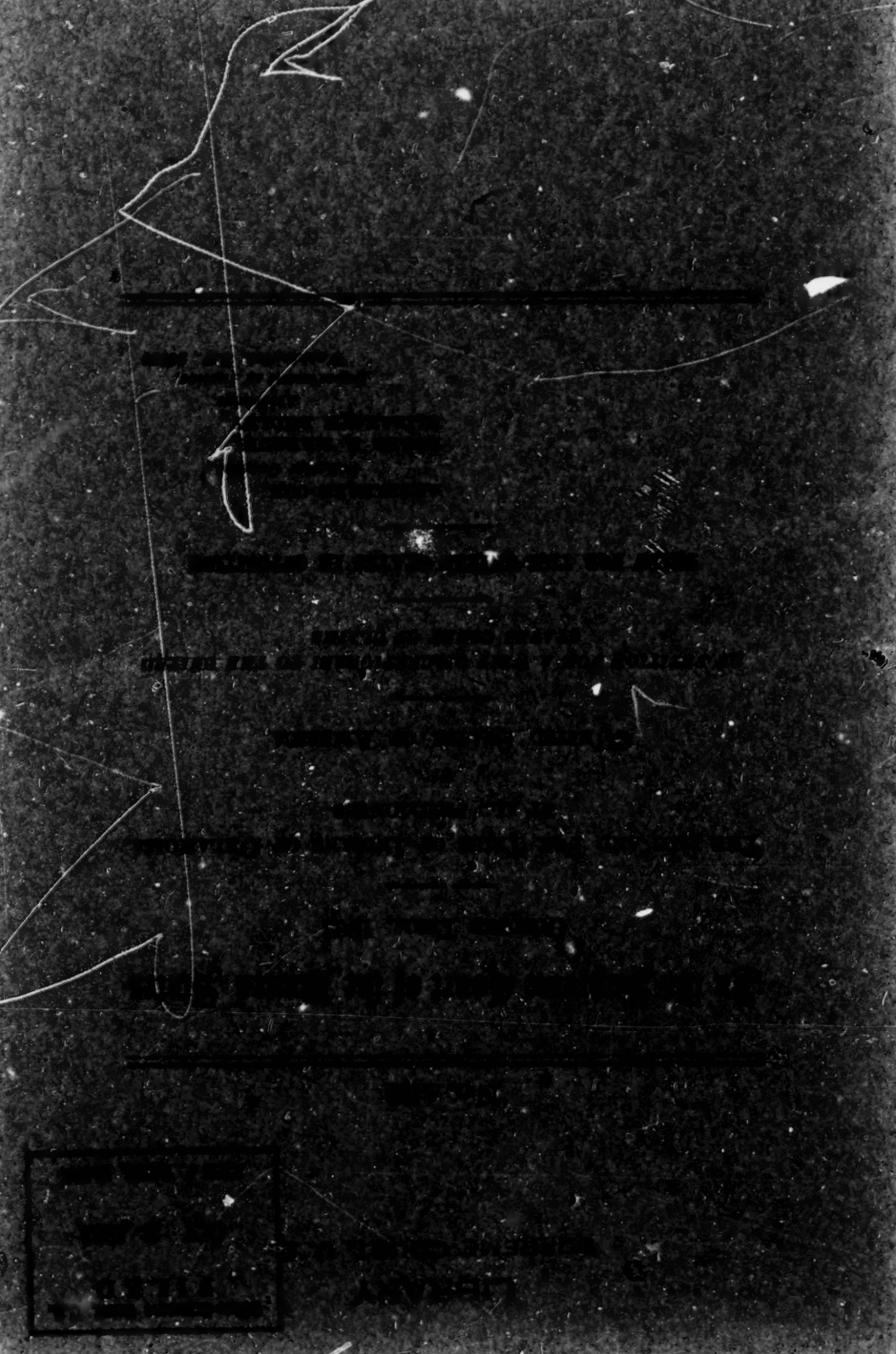

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 438

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Indian Claims Commission (Pet. 63–75) is reported at 7 Ind. Cl. Comm. 708. The opinion of the Court of Claims (Pet. 43–62) is reported at 315 F. 2d 896.

JURISDICTION

The judgment of the Court of Claims was entered on April 5, 1963. A timely motion for rehearing was denied on June 7, 1963. The petition for a writ of certiorari was filed on September 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C.

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1255(1) and Section 20(c) of the Indian Claims Commission Act of 1946, 60 Stat. 1054, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether the Indian Claims Commission and the Court of Claims erred in holding that the Sac and Fox Indians had not proved the existence of a compensable interest in two segments of a larger area for which they claimed compensation under the Indian Claims Commission Act.

STATEMENT

The Court of Claims has affirmed a judgment of the Indian Claims Commission denying compensation as to a part of an area to which petitioners claim rights. The essential facts may be briefly summarized as follows:

By the Treaty of November 3, 1804, 7 Stat. 84, the Sac and Fox Tribes ceded to the United States their rights in a large area extending north and south along the Mississippi and Illinois Rivers in southwestern Wisconsin, western Illinois, and northeastern Missouri (Pet. 32–33). Most of the land lay immediately east of the Mississippi River, but the southerly portion in Missouri was situated west of the river between it and the Missouri River. The area ceded by the Treaty of 1804 is depicted on the maps of Indian land cessions compiled by Charles C. Royce, 18th Annual Report, BAE, Part II (1896–1897), as Area 50 in the States of Illinois, Wisconsin and Missouri (Pet. 82).

Petitioners, in this suit, claimed that they had

aboriginal title to about 9,800,000 acres of land in Area 50 through exclusive use and occupancy, and also that they had a title recognized by the United States under the Fort Harmar Treaty of 1789, 7 Stat. 28, and the Greenville Treaty of 1795, 7 Stat. 49. The Fort Harmar Treaty was concluded with six Indian tribes, one being the Sac. Petitioners now make no claims under this Treaty. The Greenville Treaty was negotiated with 12 tribes. Petitioners admitted nonparticipation of the Sac and Fox Tribes, but claimed the United States must have intended by this Treaty to recognize the rights of all Indian tribes in that area to all the land on the Indian side of the general boundary established by the Treaty, and therefore to acknowledge the rights of the Sacs and Foxes even though they were not present and did not sign as contracting parties. The Commission rejected petitioners' claim of recognized title under these Treaties.

The petitioners claimed that the land was not ceded to the United States under the 1804 Treaty because the Sac and Fox chiefs who negotiated the Treaty lacked authority to convey the tribes' interests in Area 50, and because they were subjected to undue influence and duress by the United States in procuring the signatures to the document. The Commission held that Congress alone has the authority to abrogate or invalidate a treaty and, as far as it could determine, Congress had taken no steps to invalidate this Treaty; hence, it was valid, and on the effective date of the Treaty the Sac and Fox Tribes ceded their interest in Area 50 to the United States.

The Commission found that as of the effective date of the 1804 Treaty, the Sac and Fox Tribes had perfected Indian title to about 4,000,000 acres of the claimed area through actual, exclusive control, from time immemorial, but it held that as to the two remaining tracts of the claimed area, one of 5,000,000 acres and the other of 800,000 acres, the evidence failed affirmatively to show actual and exclusive use and occupancy thereof.

The Court of Claims agreed with the Commission's position on the Fort Harmar and Greenville Treaties, and held that it was unnecessary to decide the validity of the 1804 Treaty. The court further held that there is sufficient substantial evidence in the record considered as a whole to sustain the refusal of the Commission to find that petitioners' predecessors had aboriginal title to the two omitted sectors of Area 50.

ARGUMENT

1. The finding of lack of aboriginal title clearly presents no issue to be determined by this Court. "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 345. Petitioners contend that the Commission erred in failing to make a finding as to the probative value of certain statements made by officials of the United States (Pet. 10–16). The Court of Claims reviewed the several statements and held that there were sufficient grounds for rejection of them by the Commission as being insufficiently

probative of aboriginal title prior to 1804 (Pet. 58). There is no occasion for a further review of the evidence by this Court.

2. It is equally clear that petitioners did not have a recognized Indian title, that is, a right of occupancy that has been recognized by Congress either in a treaty with the tribe or by statute. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277–278. Clearly, there can be no recognition when, regardless of reason, there is no showing of either statute or treaty with the claimant Indians relating to the land in question. The Greenville Treaty, to which the Sac and Fox were not parties, is of no help to them. They had disclaimed reliance on the Fort Harmar Treaty, and the 1804 Treaty in which they ceded all their rights to the United States cannot be used to establish a recognition of such rights.

There is, so far as we know, no authority for the contention apparently urged by petitioners that besides recognized title and aboriginal title arising from long occupancy, there is a third type of compensable right based upon mere temporary possession after ouster of another aboriginal occupant. In other words, the argument is that aboriginal title does not require long continued occupancy. On the contrary, aboriginal title has always required long, continued occupation such that the area could be called the ancestral home of the claimants in the sense that it constituted definable territory occupied exclusively by them. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 345.

3. As the Court of Claims held, the validity of the 1804 Treaty is irrelevant because even if technically invalid for lack of authority of the tribal chiefs or otherwise, the ratification by the United States of the Treaty necessarily would constitute the taking of any rights that the Indians might have had to the lands which they purported to cede to the United States by the Treaty. As the court said (Pet. App. 52):

> It makes no difference to this proceeding whether the Treaty was invalid at its inception or whether it is now revised (under the Claims Commission Act) on the ground of unconscionable consideration. In either event the lands found to have been held by the Sac and Fox are to be valued as of 1804, and not thereafter.

Moreover, it is plain that the Indian Claims Commission Act did not authorize the Indian Claims Commission, contrary to the general rule (*Fellows* v. *Blacksmith*, 19 How. 366, 372; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567–568; *United States* v. *Minnesota*, 270 U.S. 181, 201), to annul the treaty ratified by Congress. On the contrary, it simply authorized the Commission to pass upon claims "which would result if the treaties * * * were revised on" the particular grounds mentioned and make a monetary award therefor.

CONCLUSION

The decision of the Court of Claims does not present a question warranting review by this Court and the petition should be denied.

Respectfully submitted.

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OCTOBER 1963.